No. 77-1254

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

CYRUS R. VANCE, SECRETARY OF STATE, ET AL.,
Appellants

v.

HOLBROOK BRADLEY, ET AL.,

On Appeal from the United States District Court for the District of Columbia

BRIEF *AMICUS CURIAE* OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS

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INTRODUCTION

The issue raised by this case is whether mandatory retirement statutes may rationally discriminate between "foreign service employees" (certain employees of the State Department's Foreign Service, the United States Information Agency, and the Agency for International Development) and other federal governmental employees in comparable positions. The American Association of Retired Persons, 1909 K Street, N.W., Washington, D.C. 20049, an organization whose members comprise over 11,000,000 persons over the age of 55, submits this *amicus curiae* memorandum because it regards this issue to be of enormous importance not only to the class of federal employees represented by the plaintiffs in this case, but also to all persons who may be denied their constitutional right to work as a result of mandatory retirement provisions.

The American Association of Retired Persons believes that all age-motivated retirement practices are wrong. They deprive our nation of the wisdom, experience and productivity of some of its most capable citizens. They deprive affected individuals of a right that should be limited only by ability, desire and need

and not by age, a factor which is neither an accurate nor appropriate criterion for distinguishing the abilities of workers.

Today, more than ever, the need to eliminate irrational mandatory retirement practices is crucial. There is an ever widening gap between retirement and employment income, heightened by inflation. The prospects for any substantial improvement in income status of retirees seem dim at this time. Today more than 15% of the population 65 years and ever lives in government-defined, low-income level, rock-bottom poverty. For older blacks this figure was 36.4% in 1974. Of elderly black women, the poorest of the poor, some 70.8% now live in poverty. The number of persons aged 65 and over who are below the official poverty level is estimated at over 5,000,000 and an additional 2,200,000 are classified as marginally poor (below 125% of the poverty level).[1]

We have no desire to burden the Court with repetition of arguments otherwise well made and urge the Court to consider fully the arguments made in the Appellees' brief regarding the unconstitutionality of mandatory retirement restrictions, in which we join. Our purpose herein is two-fold, to convince the Court that:

(1) Mandatory retirement cannot be justified on the grounds that its net effect is to recruit and promote younger people, and

(2) Age is not an appropriate criterion upon which to distinguish one employee from another insofar as productivity is concerned.

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[1] Special Committee on Aging, United States Senate, "Part I, Developments in Aging: 1975 and January-May, 1976", A Report (1976) at 62-4.

ARGUMENT

MANDATORY RETIREMENT IS NOT RATIONALLY RELATED TO ANY LEGITIMATE STATE INTEREST. THE PROMOTION OF YOUNGER PEOPLE SOLELY BECAUSE OF THEIR YOUTH IS INHERENTLY DISCRIMINATORY. AGE IS NOT AN APPROPRIATE CRITERION UPON WHICH TO DISTINGUISH ONE EMPLOYEE FROM ANOTHER.

The notion that retirement should be based on chronological age is unique to 20th century, industrialized societies. It first became part of public policy in 1935 with the passage of the Social Security Act. This Act, which covered only industrial workers, was no more than an attempt to control the nation's 25% unemployment rate. The choice of 65 (subsequently amended to 70) as a mandatory retirement age was entirely arbitrary. At the time, there was no public debate over the concept nor were there any substantive studies as to the long range social and economic consequences of such legislation.

In 1950 the mandatory retirement concept gained widespread acceptance in the private sector. Statistics indicate how these laws have affected the national work force. In 1950 24% of those 65 and older were working. According to the U.S. Department of Labor, by 1985 that figure will have dropped to 13% even though the number of persons in that age group will have doubled by then.

The real effect of these laws over the years has been to legislate non-productivity from our most experienced employees, a result which is hardly consistent with our national pride and productivity. What we have really done is to discount one of our most valuable resources.

A mandatory retirement scheme is something our society simply cannot afford. Its overall effect has been to strip older workers of their economic independence and to force them into involuntary reliance on younger, active workers for their well-being. Income security programs in the public and private

sectors already are facing serious problems of funding. By the year 2020, nearly half of the nation's population will be below 18 or 65 and older. The prospect of a future society in which a smaller work force cares for a greater non-productive sector is very real, and very frightening.[2]

A. Mandatory Retirement can not be justified on the grounds that it promotes the advancement and recruitment of younger employees.

One of the most common purported justifications of mandatory retirement has traditionally been that its net effect results in the recruiting and promotion of younger people. The District Court, and we think rightly so, dismissed this defense as being inherently discriminatory. It said:

> "The Government presents two explanations for the retirement age distinction. It first says that the mandatory retirement age is rationally related to its interest in creating advancement opportunities for younger people. However, an interest in recruiting and promoting younger people solely because of their youth is inherently discriminatory and cannot provide a legitimate basis for the statutory scheme. . . ."[3]

Not only is youth promotion one of the most traditional justifications for mandatory retirement, it is also one of the most tenacious, and it resurfaces in other guises. In spite of the District Court's expeditious rejection of the youth promotion justification, appellants, in this instance, try to reestablish its credentials in other forms. On pages 8 and 9 of appellants' brief much is made of the "selection out" program at "all Officer levels in the Foreign Service". The selection out as described in appellants' brief does not operate at all officer

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[2] See also, John F. McClellan's remarks, Hearings, Subcommittee on Labor, Committee on Human Resources, Hearings: *Age Discrimination in Employment Amendments of 1977,* U.S. Senate, 95th Cong., First Session, (1977) at 402-3.

[3] *Bradley v. Vance,* 436 F.Supp. 134 (D.D.C. 1977) probable jurisdiction noted, 46 U.S.L.W. 3709 (May 15, 1978) at 136.

levels, but rather at senior levels. It is really nothing more than youth promotion in disguise. The attrition takes place at the top, not equally throughout.

On page 29 of their brief, the appellants refer to the Navy's program sustained by this Court which observed at the time that the "up or out" program "results in a flow of promotions commensurate with the Navy's current needs and serves to motivate qualified commissioned officers to so conduct themselves that they may realistically look forward to higher levels of command."[4] It is respectfully suggested that this too is youth promotion in disguise.

Appellants argue on page 31 to the effect that promotions at the upper levels of the foreign service have slowed, therefore creating difficulties in retaining competent mid-level officers and in recruiting highly qualified persons at the bottom. This is still just another way of asserting that turn-over for turn-over sake is fair and rational and should be sustained.

The mandatory retirement of competent elderly workers is really nothing other than mandatory unemployment in disguise. The theory that the retirement of the elderly creates jobs for the unemployed younger person leads to the substitution of one group of unemployed for another. As a result, a perpetual class of unemployed is created and it consists of older people who are least favored in the job market due to the same pernicious age discrimination which prompted their involuntary retirement initially.

If instead the elderly were allowed to prolong their working lives, the burdensome cost of caring for this rapidly increasing segment of the population would be reduced. Estimates have projected that by the year 2000 there will be 31,000,000 people in the United States aged 65 or more.[5] The elderly should and must be recognized as a national resource, stable, healthy and experienced contributors to the work force.

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[4] *Schlesinger v. Ballard,* 419 U.S. 498 (1975) at 510.

[5] "The Greying of America", *Newsweek* (February 28, 1977) 50, 51-52.

The argument to the effect that mandatory retirement will reduce unemployment and promote opportunities has never been documented. On the contrary, "[a]ny contention that mandatory retirement provides job opportunities for younger employees should be severely questioned."[6] In fact there is no evidence that mandatory retirement would significantly change the composition of the work force. The reason for this is quite simply that the number of workers reaching the age of mandatory retirement in any given year is small, and the number of people both able and willing to continue working is smaller still. According to the survey data only about one in every three people will, at the point of retirement, actually elect to work.[7] Each year of course some of those individuals will decide to retire. Thus if the current federal mandatory retirement statutes were repealed, the change in the federal work force—which accounts for 2.3 million people—would be less than one-half of one percent over the next five years. Only 1.2% of the federal work force is now between 65 and 70. That represents approximately 30,000 people. Assuming only one in three stay on past age 70, only 2,000 people each year would exercise the choice to delay retirement.[8]

In testimony before the Labor Subcommittee of the Senate Committee on Human Resources, Representative Paul Finley (Republican of Illinois) rejected the youth promotion argument as follows:

> "A related objection to ending mandatory retirement is a fear that it might worsen unemployment. Our present system, however, of forcing retirees to give their jobs to

[6] Note, *Too Old to Work: The Constitutionality of Mandatory Retirement Plans,* 44 Southern California Law Review, 150, 179 (1971).

[7] *Age Discrimination in Employment,* Hearing of the Senate Committee on Labor and Public Welfare, 90th Congress, 1st Session (1967) at 383.

[8] Age profile information obtained from Maxine Barron, Chief Special Employment Program Support Section, Manpower Statistics Division, U.S. Civil Service Commission. (1977)

younger people simply trades one form of unemployment for another. Nor does depriving older and still capable Americans of jobs in order to provide them for the young make any more sense than discriminating in employment against blacks, women or religious or ethnic minorities. The latter is clearly against the law, and so should the former be.

"Our economy will absorb new workers as it has repeated waves of immigrants in the past. The maturing of World War II baby boom has passed. Estimates are that after 1978, 30 percent fewer people will enter the labor market than in the period between 1967-1977.

"In addition, according to one estimate, mandatory retirement costs the United States economy over $10 billion each year by forcing skilled workers out of factories and offices creating unnecessary job turn-over and retraining expenses. If this money could be saved, it could be put toward the creation of new jobs thus increasing total employment instead of retraining the young to take the place of those forced to retire."[9]

In answer to the question "Would raising the upper limit of ADEA cause unemployment to rise?", a spokesman for the Center on Work and Aging, American Institutes for Research, Washington, D.C. replied:

> "To the extent that more persons, protected by ADEA from mandatory retirement remained in the labor force, they would be part of the supply of available workers. In the absence of any improvement in economic growth rates, demand would remain the same.
>
> "In the aggregate, therefore, unemployment could look higher. But some of the unemployment would be shifted to other groups whose average duration of joblessness is less (given the positive relationship between dura-

[9] Hearings, *Age Discrimination in Employment Amendments of 1977,* supra, at 140-141.

tion and age) and to people who would share the burden of that unemployment more equitably with older workers rather than have them bear that burden (mandatory retirement) as they do now, to the benefit of non-older workers.

"Further, involuntary retirement now masks the forced withdrawal from the labor force by older workers pushed out by discriminatory practices. Enumerated as not in the labor force, they are not counted as unemployed even though they want to continue working. Depending on their response to survey enumerators, some are listed as discouraged workers, some as simply retired. In that sense, the official unemployment rate masks part of the unemployment of involuntary retirement."[10]

The Director of the New York State Office for the Aging has vigorously contested the notion that forced retirement makes way for younger workers:

"This idea fails to take into consideration the fact that by allowing older people to remain in the work force, society gives them the chance to earn income which in turn increases their buying power and the overall demand for consumer goods. This, of course, increases the demand for labor. Thus, keeping older people employed may in fact open up more jobs for younger people than does the use of mandatory retirement."[11]

A recent study completed and published by Banker's Life and Casualty Company (1978) (one copy of which has been logged in the Office of the Clerk of the Court) shows how the elimination of mandatory retirement provisions affect the employee composition of the given company. The text and tables on pages 5 and 7 thereof show that although many employees

[10] Id. Marc Rosenblum, at 86-87.

[11] Testimony by Lou Glasse, Director, New York State Office for the Aging, hearings on mandatory retirement, New York State Assembly, Committee on the Aging, New York, New York, January 21, 1977.

upon reaching the age of 65 choose in fact to continue working, many other employees choose to retire before the age of 65, balancing out therefore those who decide to stay. As a result the company has not become "top-heavy" with employees 65 and over, and there has been ample opportunity for younger workers to advance.

B. Age is not an appropriate criterion for distinguishing employees' abilities.

Scientific studies have consistently demonstrated that age is not a suitable criterion for distinguishing employees' abilities. Studies of older employees indicate that their performance is rated as good or superior to younger workers in almost all respects, that there is no set pattern of the decline in intellectual productivity and indeed that many persons have increased productivity in their seventies, eighties and nineties.[12]

One of the most recent reports on employees' productivity appears in the Banker's Life and Casualty Company report (supra). Its studies have shown that facile comparisons of absenteeism, health, productivity and performance between age groups are impossible to document.

[12] *See generally, Age Discrimination in Employment: The "Problem" of the Older Worker,* 41 N.Y.U.L. Rev. 383, 396-8 (1966); Note, *Too Old to Work, the Constitutionality of Mandatory Retirement Plans, 44 So. Cal. L. Rev. 150, 159-61 (1971);* Petersen, "Older Workers and Their Job Effectiveness," in *Gerontology* (C. B. Vedder ed. 1963); Green, "Age, Intelligence and Learning," *Industrial Gerontology,* No. 12, Winter 1972, at 29-40; Nevil Tronchin-James, *Arbitrary Retirement* (1962), particularly chapters 7 and 8; Baltes and Schaie, "The Myth of the Twilight Years," *Psychology Today* 35 (March 1974); Sheppard, *Towards an Industrial Gerontology* (1970); "Comparative Job Performance of Office Workers by Age," *Monthly Labor Review,* January 1960, at 39; Special Committee on Aging, United States Senate, "Improving the Age Discrimination Law," a Working Paper (1973) at 15; Christensen, "Interference in Memory as a Function of Age," XXIX *Dissertation Abstracts* 2216-B (1968); Szafran, "Psychological Studies of Aging in Pilots," 40 *Aerospace Medicine* 543 (1969); *Age Discrimination in Employment,* Hearings of the Senate Comm. on Labor and Public Welfare, 90th Cong., 1st Sess., at 370-71 (1969).

Dr. James Birren, Director of the Gerontology Center at the University of Southern California has analyzed the change in intellectual capacities in later life as follows:

> "Because of my research background I have been involved in several policy discussions during my career about the use of chronological ages as an index for retirement. This has involved a role as a consultant to the Federal Aviation Agency with regard to commercial airline pilots, United States Army, and other groups. My own research has borne out the fact that given good health there is little change in intellectual capacities in later life, i.e. decrements in ability occur when an individual has suffered a change in health, but not because of intrinsic processees that could be identified with chronological age or aging."[13]

In a working paper prepared for use by the Special Committee on Aging of the U.S. Senate (August, 1977), the arguments against mandatory retirement are summarized as follows:

> "1. Chronological age alone is a poor indicator of ability to perform on the job. Mandatory retirement at a fixed age does not take into account a worker's abilities and capacities which vary sharply from individual to individual. . . .
>
> "2. Mandatory retirement is based, to a certain degree, upon a misconception that older workers do not perform as well on jobs as younger persons. However, several studies indicate that they perform as well as their younger counterparts and in some cases notably better. . . .
>
> "3. Mandatory retirement can cause financial hardship for older persons. Many elderly individuals need to work because social security benefits are inadequate.

[13] Birren, *Increments and Decrements in the Intellectual Status of the Aged,* Psychiatric Research Report 23, at 207, 213 (1968).

Mandatory retirement can also cause lower social security benefits if the last years of the employee's job should produce higher earnings than the earlier years. It can also be disadvantageous for women who oftentimes have an in-and-out work pattern. Compulsory retirement limits their working years which in turn can reduce their ability to build up pension benefits.

"4. Mandatory retirement can have adverse physical and psychological effects. . . .

"5. Compulsory retirement increases the cost of income maintenance programs such as social security. It also adds to the cost of private pension programs.

"6. Forced retirement is based upon the myth that older workers must 'make way' for younger workers. . . .

"7. Another myth is that retaining a worker past the normal retirement age automatically increases an employer's pension costs. There are several options available to prevent any increases in pension costs. For example, workers remaining past the normal retirement date can receive the same dollar benefit upon actual retirement that they would have received if they had retired on the normal date."[14]

We subscribe to all of the foregoing arguments and request this Court to give them the consideration they deserve. We would hope that as a result of the decision in this case, one more form of discrimination, namely, age discrimination in employment, will disappear.

[14] Hearings, *Age Discrimination in Employment Amendments of 1977,* supra, at 39-41.

CONCLUSION

FOR THE FOREGOING REASONS AMICUS CURIAE RESPECTFULLY URGES THE COURT TO AFFIRM THE DECISION OF THE DISTRICT COURT.

Respectfully submitted,

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Attorneys for *Amicus Curiae*

ALFRED MILLER,
NANCY R. WALTER,
Of Counsel

Dated: September 22, 1978
New York, New York

EXHIBIT A.

Consent of Parties Obtained.

OFFICE OF THE SOLICITOR GENERAL

WASHINGTON, D. C. 20530

(SEAL) June 2, 1978

Nancy R. Walter, Esq.
Miller, Singer, Michaelson
& Raives
1909 K Street, N.W.
Washington, D. C. 20006

Re: Cyrus R. Vance, Secretary of State, et al. v. Holbrook Bradley, et al. (October Term, 1977—No. 77-1254)

Dear Ms. Walter:

I hereby consent to the filing of a brief *amicus curiae* in the above-captioned case by Alfred Miller, Esq., on behalf of the National Retired Teachers Association and the American Association of Retired Persons in the Supreme Court.

Sincerely,

/s/ WADE H. MCCREE, JR.
Wade H. McCree, Jr.
Solicitor General

cc: Alfred Miller, Esq.
Miller, Singer, Michaelson
& Raives
555 Madison Avenue
New York, New York 10022

LETTERHEAD OF BRUCE J. TERRIS

June 24, 1978

Ms. Nancy R. Walter
Miller, Singer, Michaelson & Raives
555 Madison Avenue
New York, N. Y. 10022

Re: Vance v. Bradley, No. 77-1254

Dear Ms. Walter:

In response to your letter of May 24, 1978, this is to advise that appellees have no objection to the filing of an amicus brief by counsel for the National Retired Teachers Association and the American Association of Retired Persons on the above-referenced appeal.

Very truly yours,

/s/ EDWARD H. COMER
Edward H. Comer